PETITION

FOR A

WRIT OF

CERTIORARI

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Rule Involved	3
Statement	4
Reasons for Granting the Writ	6
Argument	7
Conclusion	15
Appendix:	
Opinion of the Court of Appeals	i-ix
Dissenting Opinion	ix-x
Opinion of the District Court	xi-xxvii
Judgment of the Court of Appeals	xxviii

CITATIONS

CASES:

Alabama v. United States, 279 U.S. 229, 231	9
Alltmont v. U. S., 3 Cir., 177 F.2d 971, 987, cert. den., 339 U.S. 967	7
Carter v. Baltimore & O. R. Co., U.S. App. D.C., 152 F.2d 129	7
Cities Service Oil Co. v. Celanese Corp. of America, 10 F.R.D. 458	7

INDEX CONTINUED

PAGE

Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 318 U.S. 523 9

Hawaiian Airlines v. Trans-Pacific Airlines Ltd., 8 F.R.D. 449 7

Hickman v. Taylor, 3 Cir., 153 F.2d 212, affirmed, 329 U.S. 495 7

Hudalla v. Chicago, M. S. P. & P. R. Co., 10 F.R.D. 363 7

Martin v. Capital Transit Co., 83 U.S. App. D.C. 239, 170 F.2d 811 7

O'Malley v. Chrysler Corporation, 7 Cir., 160 F.2d 35 7

Reynolds v. U. S., 3 Cir., 192 F.2d 987, reversed on other grounds, 345 U.S. 1 7

Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689 7-8

U. S. v. Certain Parcels of Land, 15 F.R.D. 224 7

United States v. W. T. Grant Co., 345 U.S. 629, 634 9

Vermilyea v. Chesapeake & Ohio Ry. Co., 11 F.R.D. 255 7

William A. Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487 7

STATUTES:

62 Stat. 928, 28 U.S.C., Sec. 1254(1) 2

62 Stat. 930, 28 U.S.C., Sec. 1332 4

RULE:

Rule 34 of the Rules of Civil Procedure for the District Courts of the United States 3, 7

In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

CONTINENTAL OIL COMPANY,
Petitioner,

VERSUS

CORDELIA PEARL WILLIAMS, successor in interest to Paul S. Williams; MARY LOWE JOHNSON; BENNIE JOHNSON; NORA JOHNSON LOWE; JOHN E. LOWE; ELIZABETH LOWE and MARY ALICE LOWE FRANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Continental Oil Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the judgment of that court reversing a judgment of the United States District Court for the Western District of Oklahoma, and remanding the cause to the District Court with directions to enter an order for the making of a deviational and directional survey of the bore hole of an oil and gas well owned and operated by petitioner, and for further proceedings thereafter.

OPINIONS BELOW

The opinions of the Court of Appeals (R. 42)[1] are reported at 215 F.2d 4, and are appended hereto. The opinion of the District Court (R. 20) is reported at 14 F.R.D. 58, and is appended hereto.

JURISDICTION

The date of the judgment of the Court of Appeals, and the time of its entry, was August 19, 1954 (R. 52). A petition for rehearing was denied on September 22, 1954 (R. 53). The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Where the District Court, after a full hearing, denies respondents' application for an order under Rule of Civil Procedure 34 for a deviational and directional survey of the bore hole of petitioner's oil well, alleged by respondents to be bottomed beneath their land, may the Court of Appeals, without finding that the District Court abused its discretion or that there was no reasonable basis for such discretionary ruling, properly reverse the same merely because the Court of Appeals, in its review of the evidence and reappraisal of the facts, reaches a different conclusion?

2. Whether the Court of Appeals, in weighing the evidence for the purpose set forth above, may consider, or

[1] Herein R. will indicate a reference to the printed portion of the record, and T. a reference to the typewritten portion.

rely upon, the opinions of expert witnesses when such opinions are based upon assumed premises and suppositions which have no evidentiary support and are contrary to the uncontradicted evidence.

RULE INVOLVED

Rule 34 of the Rules of Civil Procedure for the District Courts of the United States:

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

STATEMENT

The action is for damages for the alleged conversion of over 750,000 barrels of oil (R. 2-6). Federal jurisdiction rests upon diversity of citizenship of the parties, the matter in controversy exceeding the sum of $3,000.00. 62 Stat. 930, 28 U.S.C., Sec. 1332.

Respondents allege that in 1928 petitioner drilled an oil and gas well, known as petitioner's Munnah Cosar Well No. 1, at a point 330 feet west and 330 feet north of the southwest corner of respondents' land, that in the drilling thereof the drill bit deviated from the vertical in an easterly direction, and that the well was drilled into the oil-bearing stratum at a point beneath respondents' land. It is alleged that in the succeeding years petitioner has produced from its well, and has converted to its own use, many thousands of barrels of oil rightfully belonging to respondents, and an accounting therefor is sought (R. 2-6). As a part of their complaint respondents sought an order, pursuant to Rule 34, requiring petitioner to permit a deviational and directional survey of the bore hole of its Munnah Cosar Well in order to determine the exact location of the lower terminus thereof (R. 6). Petitioner, asserting the absence of probable cause for belief that the well was bottomed beneath respondents' land and that "good cause", within the meaning of Rule 34, for the making of the survey could not be shown, resisted respondents' request because of the attendant danger of the well's destruction (T. 373-376).

The District Court conducted an extensive hearing to determine whether "good cause" for the making of the

requested survey existed. In an exhaustive opinion, including findings of fact, the trial court concluded that respondents had not shown good cause for the survey, that their theory of subsurface trespass was "purely conjectural and speculative to the highest degree", that the making of such a survey conceivably could result in total destruction of the well and possible loss of the remaining oil reserves, and that in such circumstances the request should be denied (R. 20-35; 14 F.R.D. 58; Appendix, *infra*).

Thereafter the case was tried on the merits, and the trial court, finding that there was "no substantial evidence of a subsurface trespass", directed a verdict for petitioner (R. 36-37).

On respondents' appeal the Court of Appeals reviewed and weighed the evidence. It made no finding that there had been an abuse of discretion by the trial court or that the decision denying the survey was clearly wrong or without a reasonable basis. It concluded merely that,

> "When the evidence is viewed in its entirety, we think that good cause for the making of the survey was shown and that an order should have been entered for its making * * *" (R. 50).

Accordingly, the judgment of the District Court was reversed and the cause remanded with directions to enter an order for the making of the deviational and directional survey, and for further proceedings thereafter (R. 42-50; 215 F.2d 4; Appendix, *infra*).

Judge Phillips dissented, stating that in his opinion the trial court's determination "whether good cause has been shown * * * should not be disturbed, in the absence

of a showing of a clear abuse of discretion", and that the trial court correctly concluded that occurrence of a subsurface trespass was only "a very remote possibility" (R. 50-51, Appendix ix-x).

At the hearing in the trial court only two witnesses expressed the opinion that the Munnah Cosar is bottomed at a point east of its surface location. The District Court gave little or no weight to these opinions because they obviously were based upon assumed premises which not only had no support in the evidence but were contradicted by the physical facts and the undisputed evidence. The Court of Appeals, however, in its review of the facts, gave this opinion evidence full credit, and ignored petitioner's contention that it was based upon demonstrably false premises and, therefore, worthless.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, by reversing a discretionary ruling of the trial court under Rule 34, in the absence of a determination that the trial court's ruling was clearly wrong or constituted an abuse of discretion, decided an important question of federal procedural law which has not been, but should be, settled by this Court, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Court of Appeals, in accepting at face value opinion evidence which admittedly was based, not upon the evidence, but upon the naked suppositions and un-

warranted assumptions of the expert witnesses themselves, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

1.

The District Court, in determining whether "good cause" has been shown under Rule 34, necessarily is vested with a wide discretion. *Reynolds* v. *U. S.*, 3 Cir., 192 F.2d 987, reversed on other grounds, 345 U.S. 1; *Hickman* v. *Taylor*, 3 Cir., 153 F.2d 212, *affirmed*, 329 U.S. 495; *Martin* v. *Capital Transit Co.*, 83 U.S. App. D.C. 239, 170 F.2d 811; *Alltmont* v. *U. S.*, 3 Cir., 177 F.2d 971, 987, *cert. den.*, 339 U.S. 967; *Carter* v. *Baltimore & O. R. Co.*, U.S. App. D.C., 152 F.2d 129; *O'Malley* v. *Chrysler Corporation*, 7 Cir., 160 F.2d 35; *U. S.* v. *Certain Parcels of Land*, 15 F.R.D. 224; *Vermilyea* v. *Chesapeake & Ohio Ry. Co.*, 11 F.R.D. 255; *William A. Meier Glass Co.* v. *Anchor Hocking Glass Corp.*, 11 F.R.D. 487; *Cities Service Oil Co.* v. *Celanese Corp. of America*, 10 F.R.D. 458; *Hudalla* v. *Chicago, M. S. P. & P. R. Co.*, 10 F.R.D. 363; *Hawaiian Airlines* v. *Trans-Pacific Airlines Ltd.*, 8 F.R.D. 449. Compare *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, decided prior to adoption of the rules, where MR. JUSTICE CARDOZO said, in part:

> "There are few fields where considerations of practical convenience should play a larger role * * *.
>
> * * * * * * * *

"To hold that the plaintiff in an action at law may have discovery of damages is not to say that the remedy will be granted as of course, or that protection will not be given to his adversary against impertinent intrusion. * * * It is all a matter of discretion."

The trial court, after weighing the evidence, concluded that it was "inconceivable * * * that the bore hole of Munnah Cosar wandered either to the east or northeast and converted some 700,000 barrels of oil from the very land where three other wells obtained a combined production of only something over 60,000 barrels." In view of this finding the trial court, in the exercise of its discretion, was unwilling to expose petitioner to the attendant hazards of a survey. That this ruling was amply justified by the evidence is apparent from the recital of the facts appearing in the opinions of both of the courts below.

The majority of the Court of Appeals did not determine, or even imply, that the trial court's ruling was clearly erroneous, or that there was no reasonable basis therefor, or that the trial court had abused its discretion. They merely disagreed with the trial court's conclusion that good cause for the requested survey had not been shown. Thus, of the four judges who have reviewed the facts, two are firmly of the opinion that a survey should not be ordered, and two others think differently. In such circumstances the discretionary ruling of the trial judge, who saw and heard the witnesses and gave such careful attention to all of the facts, should not be disturbed.

It is fundamental that an appellate court will not reverse a discretionary ruling of the trial court unless it is

demonstrated that there is "no reasonable basis" for the trial court's decision, or that the same is manifestly wrong, thus constituting an abuse of discretion. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 634. The duty of the appellate court in such cases

> "is not to decide the merits but simply to determine whether the discretion of the court below has been abused." *Alabama* v. *United States*, 279 U.S. 229, 231.

In *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523, the Court, in discussing a discretionary decision by the District Court in proceedings under Section 77 of the Bankruptcy Act, said at page 564:

> "The question in each case is one for the informed discretion of the Commission and the District Court. We cannot say that that discretion has been abused here.
>
> "* * * Since such a determination rests in the realm of judgment rather than mathematics, there is an area for disagreement. But we are not performing the functions of the District Court under § 77 (e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

The majority of the Court of Appeals usurped the function of the trial court, and ignored the rule this Court so often has laid down for the guidance of appellate courts in their review of discretionary rulings. In so doing, they departed from the accepted and usual method of appellate

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December 29, 1954

Harold B. Willey, Esq., Clerk
The Supreme Court of The United States
1 First Street NE
Washington, D. C.

RE: Continental Oil Company, Petitioner, vs.
Cordelia Pearl Williams, et al. No. 487.

Dear Sir:

This is to advise the Court, through your office, that the Respondents in the above captioned cause waive their right and remaining time under Court Rule 24, to file a brief in opposition to the petition for certiorari.

Respondents do not acquiesce in the petition nor admit any statement or interpretation appearing therein concerning the merits or the propriety of review, such interpretation being vigorously denied both as to facts and inference, but Respondents regard the joinder of issue as to such factual controversy by brief opposing the petition for certiorari as inappropriate and unnecessary.

Respectfully,

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review, and their action calls for the exercise of this Court's power of supervision. It is important to the bench and bar that this Court determine the proper scope of review of a Court of Appeals when discretionary decisions under Rule 34 come before it on appeal. It is important that this Court settle the question whether, in such cases, where a District Court's finding is supported by substantial evidence and rests upon a reasonable basis, a Court of Appeals properly may reappraise the facts and determine *de novo* for itself how the District Court's discretion should be exercised.

2.

The well in question is located on the northeast edge of the prolific Little River structure, or oil field. Respondents' land lies east and northeast of the well. Thus, the Munnah Cosar is located between the main body of a proven oil reservoir to the southwest and respondents' land on the east. Respondents' land is surrounded by "dry holes" on three sides, on the north, the east and the southeast (Plaintiffs' Exhibit 2). Also, in 1928, a well was drilled in the southwest corner of respondents' land which produced only 60,000 barrels of oil during a three-year period, and then was plugged and abandoned because of declining production (T. 104, 313).

Three major issues of fact were involved in the trial court hearing; (1) whether respondents' land is underlain by oil and gas in commercial quantities, (2) whether in

uncontrolled rotary drilling[2] the drill bit, when it deviates from the vertical, will follow a spiraling or random course or will proceed off vertical in a single direction, and (3), if the latter, whether the drill bit in the Munnah Cosar went toward respondents' land to the east or toward the highly productive Little River pool to the south and southwest. Assuming, *arguendo*, that there was sufficient evidence to support a finding either way on the first two issues, there was no competent evidence whatever of probable cause to believe that the course of the drill bit was eastward instead of any one of a number of other directions.

It would appear from the majority opinion of the Court of Appeals, however, that there was substantial evidence that the course of the hole was toward respondents' land. In their opinion they say that some of the experts

> "* * * expressed the opinion that when the hole deviated from the vertical it started in the general direction of plaintiffs' land, continued in that general direction, and extended to a point of terminus underneath land of plaintiffs."

At another place the majority say that some of the experts testified that

> "* * * in their considered opinion the hole was bottomed in the subsurface of plaintiffs' land."

---

[2] The well was drilled in the early days of rotary drilling before the oil and gas industry had learned how to drill a straight hole with rotary tools (T. 594, 589, 510, 37, 41-42). Admittedly the well was drilled in the usual manner in accordance with the accepted standards and practices of the time, with no effort or intention to drill anything other than a straight, vertical hole (T. 235-236, 238, 385-386).

Thus, it is obvious that the majority gave credence to the conclusions of the principal plaintiff, Williams, and of his witness, Dooley, the only witnesses who expressed any such opinion. In so doing, the majority completely overlooked or ignored petitioner's contention that the premises upon which those opinions admittedly were based had no support whatever in the evidence and, indeed, were plainly contradicted by the physical facts and the undisputed evidence. The premises upon which Williams and Dooley based their opinions constituted nothing more than their own false suppositions and unwarranted assumptions of fact. Petitioner's contention in this respect is not disclosed in the majority opinion of the court below, notwithstanding the fact that the contention was plainly presented in the briefs, oral argument and petition for rehearing. For aught that appears from the opinion below no such contention was made. It would appear from that opinion that there was no question before the Court with respect to the admissibility or weight of the fanciful conclusions of Williams and Dooley.

The sole basis for Williams' conclusion that the Munnah Cosar is not bottomed in the Little River pool to the south or west, and therefore necessarily is bottomed to the east or northeast[3], was the fact that the wells in the Little River pool produced large quantities of salt water with the oil produced therefrom, and his naked assumption that the Munnah Cosar "was producing practically no water" (T. 154). Therefore, he said, the Munnah Cosar could not be producing from the Little River reser-

[3] A dubious conclusion, even on its face, since it ignores the possibilities to the southeast, north, and northwest.

voir. But the evidence showed without dispute that the Munnah Cosar for many years has produced, and still produces, large volumes of salt water (T. 336-346, 349, 351-353, 359, Plaintiffs' Exhibit 7). Even Dooley, respondents' other expert, contradicted Williams' supposition that the Munnah Cosar produces little salt water (T. 653-654, 306).

Dooley's conclusion that the lower terminus of the hole is east of the well's surface location was based wholly upon the false assumption that the earth's beds at the well's location rise to the northeast, and that the bit in a drilling well tends to drift in the direction in which the earth's beds, or subsurface strata, rise, variously expressed as "going updip" or "climbing up hill" (T. 287-289, 312, 608, 659). But respondents' own evidence showed that the subsurface strata immediately beneath the Munnah Cosar rise to the southwest instead of the northeast (T. 37-38, 92, 213, Plaintiffs' Exhibit 2).

Manifestly, the opinions of Williams and Dooley that the Munnah Cosar is not bottomed in the Little River structure, but at some point to the northeast, cannot properly be given any credit at all. If, in arriving at their conclusions, they had taken into consideration the facts established by respondents' own evidence, instead of their own arbitrary assumptions to the contrary, they would have been forced to conclude on the basis of their own reasoning that the drill bit proceeded "up-dip" in a southwesterly direction and that the well is bottomed in, and producing from, the Little River pool.

Citation of authority is hardly necessary for the proposition that an expert must base his opinion as to the ultimate fact upon a hypothesis which at least has some support in the evidence, and that, *a fortiori*, he may not assume the existence of a premise which is wholly contradicted by the evidence. *United States* v. *Hill*, 8 Cir., 62 F.2d 1022:

> "Necessarily, the weight of the opinion of an expert depends largely upon the facts upon which it is based. If supported by the evidence and by reason and common sense, it may carry great weight. If not justified by the evidence or by reason, it is entitled to no weight. * * * It is safe to say that an opinion rises no higher than the level of the evidence and the logic upon which it is predicated."

Respondents, in their efforts to show good cause for belief that the Munnah Cosar is bottomed beneath their land, ultimately rested their entire case upon the opinions of Williams and Dooley. Thus, their case was without any foundation whatever. The majority of the Court of Appeals, however, in weighing the evidence, not only have given credence to these unfounded opinions—they have refused even to discuss petitioner's contentions regarding their lack of basis and consequent worthlessness. In so doing, they have so far departed from the accepted and usual method of appellate review as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1954.

APPENDIX

Opinion of the Court of Appeals (215 F.2d 4)

WILLIAMS ET AL.

v.

CONTINENTAL OIL CO.

No. 4819.

United States Court of Appeals
Tenth Circuit.

Aug. 19, 1954.

Rehearing Denied Sept. 22, 1954.

Before PHILLIPS, Chief Judge, and BRATTON and MURRAH, Circuit Judges.

BRATTON, Circuit Judge.

The only question necessary to be determined on this appeal is whether the trial court erred in refusing to enter an order under Rule of Civil Procedure 34, 28 U.S.C., requiring the defendant to permit the making of a deviational and directional survey of an oil and gas well belonging to the defendant for the purpose of ascertaining whether the underground terminus of the well is in the subsurface of a tract of land belonging to plaintiffs.

Paul S. Williams and others instituted the action against Continental Oil Company to recover damages for alleged underground trespass. Later, Fisher Oil Company was joined as a party defendant but it was subsequently eliminated from the case and no further reference will be made to it. Plaintiffs in composite own a certain tract of land and the mineral interests therein in Seminole County, Oklahoma. In 1928, the defendant drilled the Munnah Cosar Well No. 1 on a tract of land adjoining the land owned by plaintiffs. The well is located approximately 330

feet west and 330 feet north from the southwest corner of the land belonging to plaintiffs. The cause of action pleaded in the amended complaint was that as the well was being drilled it deviated from the vertical, went across the boundary line of plaintiffs' land, and extended into an oil bearing stratum known as the Wilcox Sand underneath plaintiffs' land; that by the operation of the well, the defendant had been drawing from plaintiffs' land oil, gas and hydrocarbons; and that the defendant had converted and appropriated unto itself oil and gas belonging to plaintiffs. In the amended complaint, plaintiffs sought an accounting and, as incidental relief in the nature of discovery, an order requiring defendant to permit the making of a deviational and directional survey of the well. The defendant denied many of the material allegations contained in the amended complaint and pleaded limitations and laches.

The cause came on for hearing upon the application of plaintiffs for an order requiring the defendant to permit the making of the survey. At the beginning of the hearing, plaintiffs made an offer in open court. The substance of the offer was that the survey be made under the direction and supervision of the court; that it be made by a company of the court's own choice; that each party be given the privilege of having an expert representative present when the survey was made; that the report of the survey be made directly to the court; that plaintiffs advance the expense of the making of the survey, such expense to be later taxed as costs; that plaintiff file in the cause a reasonable bond to protect the defendant against any damage which might be done to the well in connection with the making of the survey; that the bond include protection against loss by virtue of the well being out of production during the making of the survey; and that plaintiffs would dismiss the action with prejudice if the report of the survey failed to show that the bottom of the hole was in the subsurface of the land belonging to plaintiffs. Defendant rejected the

offer and in effect objected *per se* to the survey being made regardless of any offer which plaintiffs might make in connection therewith. The hearing was extended. The evidence covers more than 600 typed pages in the record. Findings of fact were made and an exhaustive opinion was delivered. The court proceeded upon the premise that such a survey would furnish competent and material evidence for use when the case came on for trial on its merits; that such a survey would greatly aid plaintiffs in the preparation of their case for trial; and that it was the only means by which it could be determined with certainty whether the well was bottomed in the subsurface of the land belonging to plaintiffs. But the court expressed the view that there was only a remote possibility that the deviation of the well was all in one direction, and that the hole probably pursued a wandering or gently spiraling course and is bottomed at a point with a horizontal deflection from the surface location of 500 feet or less. The court noted its recognition of the fact that the geological, seismographical, and engineering testimony submitted at the hearing was in decided conflict, and that there existed a wide divergence of opinion among the expert witnesses. But the court expressed the conviction that there was no convincing evidence that there was an oil producing structure beneath plaintiffs' land, or that such land ever had been underlaid by recoverable oil in commercial quantities. And the court concluded that plaintiffs' theory of the case was purely conjectural and speculative to the highest degree and did not justify the hazard incident to the making of the survey. Accordingly the court declined to order the making of the survey, 14 F.R.D. 58.

Several months after entry of the order refusing the application for the making of the survey, the case came on for trial on its merits. A jury was impaneled but there was no formal trial. By agreement of the parties, a transcript of the proceedings had on the hearing upon the

application for the order for the making of the survey was introduced in evidence, and a token of additional evidence was introduced. The court directed a verdict for the defendant; judgment was entered accordingly; and plaintiffs appealed. After the appeal was perfected, plaintiff Paul S. Williams died and Cordelia Pearl Williams, successor in interest of the decedent, was substituted as party appellant. For convenience, continued reference will be made to the parties as plaintiffs and defendant, respectively.

It is not inappropriate to observe that the question whether a court of equity has the power to order the making of a deviational and directional survey in a case of this kind, as well as the question whether such a survey should be ordered in the varying circumstances presented, is not new. The power of the court to order the making of a survey of the kind sought here has been enunciated and the correctness of such an order has been upheld in certain cases in state courts. *Union Oil Company of California* v. *Reconstruction Oil Co.*, 4 Cal.2d 541, 51 P.2d 81; *Gliptis* v. *Fifteen Oil Co.*, 204 La. 896, 16 So.2d 471; *Hastings Oil Co.* v. *Texas Co.*, 149 Tex. 416, 234 S.W.2d 389; *Texas Co.* v. *Hollingsworth*, 304 Ill.App. 607, 27 N.E.2d 67, reversed for absence of necessary parties, 375 Ill. 536, 31 N.E.2d 944. These cases are not controlling, but they do articulate with some persuasion the general direction to which the appropriate exertion of the court's discretion points.

Rule of Civil Procedure 34 provides in presently material part that upon the motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may order any party to permit entry upon designated land or other property in his possession for the purpose of surveying the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b); and that the

order may prescribe such terms and conditions as are just. In a case of this kind which necessarily turns upon the location of the bottom of an oil and gas well, the court has power under the rule to order the making of a deviational and directional survey. *Humble Oil & Refining Co.* v. *Sun Oil Co.*, 5 Cir., 175 F.2d 670. But the moving party is not entitled as a matter of right to an order for the making of such a survey. Under the rule, it is incumbent upon the party applying for the order to make a showing of good cause. *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451; *Martin* v. *Capital Transit Co.*, 83 U.S.App.D.C. 239, 170 F.2d 811; *Safeway Stores* v. *Reynolds*, 85 U.S. App.D.C. 194, 176 F.2d 476; *Alltmont* v. *United States*, 3 Cir., 177 F.2d 971, *certiorari denied*, 339 U.S. 967, 70 S.Ct. 999, 94 L.Ed. 1375.

No abstract rule of thumb has been devised for ready use in determining in every case whether good cause has been shown. In each case the question is whether special circumstances make it essential to the preparation of the moving party's case that the desired information be made available to him. And in appraising for that purpose the circumstances in a particular case, the trial court is vested with a reasonable range of discretion to be exercised with due regard for the interests and equities of the parties. *Hickman* v. *Taylor, supra; Reynolds* v. *United States*, 3 Cir., 192 F.2d 987, reversed on another ground, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727. The trial court was not unmindful of these principles, and the defendant concedes them. The denial of the order for the making of the survey was predicated upon the basis that plaintiffs failed to show good cause, and the defendant seeks to sustain the order on that ground.

With these generalizations in mind, we come to consider whether plaintiffs discharged the burden resting upon them to show good cause for the requested order for the making of the survey of the well and whether the re-

quest was improvidently denied. The well was drilled in the usual manner and in accordance with the accepted practices obtaining at the time. At the time of the hearing, the well had produced more than 700,000 barrels of oil, and its future production was estimated to be 100,000 barrels. There was no intention or effort to drill a crooked hole. But the hole was crooked. The defendant learned that fact while the well was being drilled. Shortly after the completion of the well, the defendant caused to be made a deviational examination or survey of the hole but not a directional survey. The examination was made by means of a device known in the oil producing industry as an acid bottle inclinometer and it showed that the well was crooked but did not disclose the compass direction of the deviation from the vertical. It disclosed facts from which it could be determined that if the vertical deviation were all in one direction, the horizontal displacement between the surface location and the underground terminus of the hole would be about 1,000 feet. After the filing of the suit and before the hearing upon the application for the order for the making of the directional survey, the defendant made a second deviational test, but not a directional survey, with the acid bottle inclinometer; and it confirmed in substantial respects the facts developed on the first test. Evidence was introduced respecting the location, depth, and productive history as to oil and water of the well in question and other wells in the area. Some of the evidence consisted of official records, logs, maps, geological data, seismographical data, geophysical data, and other pertinent data. And geologists, seismographers, petroleum engineers, and others experienced in the oil industry testified as experts. The testimony of the expert witnesses was in great detail and it presented points of complete agreement and points of irreconcilable difference. In the main, the expert witnesses testifying for plaintiffs and those testifying for the defendant were sharply opposed to each other in respect to whether the land belonging to plaintiffs

was underlaid by recoverable oil in commercial quantities and whether the underground terminus of the well was beneath the surface of the land belonging to plaintiffs. In reaching their respective conclusions, the witnesses took into consideration and gave what they deemed to be appropriate weight to various factors. Some of the witnesses testifying for plaintiffs expressed the opinion that the land belonging to plaintiffs was underlaid by recoverable oil in commercial quantities; and some expressed the opinion that when the hole deviated from the vertical it started in the general direction of plaintiffs' land, continued in that general direction, and extended to a point of terminus underneath land of plaintiffs. On the other hand, some of the expert witnesses testifying for the defendant expressed the opinion that there was no oil in commercial quantities underneath the land of plaintiffs; and some expressed the opinion that when the hole deviated from the vertical, it pursued a wandering or spiraling course and did not get far enough from the vertical below the surface of the hole to reach any point underneath the land belonging to plaintiffs. Much of the testimony of the expert witnesses was in substance interpretations and conclusions based upon physical facts and available data. Some of the conflict among such witnesses lay in part to their respective views as to whether the well in question was producing from the old reservoir underlying the Little River Oil Field or from a separate and distinct reservoir underlying plaintiffs' land. There was evidence that a directional survey is the recognized and accepted method of ascertaining with certainty the direction taken by a crooked hole of an oil well; that the procedure for making such a survey is to pull the rod and tubing from the hole, insert in or attach to the bottom of the tubing the device or mechanism, put the tubing back into the hole the full length so that the device or mechanism is at the bottom of the hole, pull out the tubing again, remove the device or mechanism, and then

return the rod and tubing to their proper position in the hole for operation purposes; that the making of the survey would not damage the well; that the survey could be made within twenty-four hours or less; and that the cost would be approximately $1,000. The witness who testified to these facts said that he had been employed by one of the two companies engaged in the making of such surveys; that he had made or was connected with the making of several hundred such surveys in the mid-continent area and in two foreign countries; that there was nothing about the making of such a survey which involved extraordinary risk of injury or damage to the well; and that he did not know of a single instance where a well had sustained any such injury. A witness for the defendant, with experience in the oil producing business but none in the making of directional surveys, testified that in view of the age of the casing in the well he thought there was some danger of the casing giving way during the making of the test; that in such event, the drilling of a new well might be the only corrective procedure; and that there was a possibility that the new well would not produce as much oil as was expected from the old well. But there was no testimony of a single instance in which a well had sustained substantial injury or damage arising out of the making of such a survey. Viewed in its entirety, the evidence left in the realm of inference or probabilities the ultimate question whether the underground terminus of the hole was underneath the land belonging to plaintiffs. Plaintiffs offered in substantial quantity testimony of experts that in their considered opinion the hole was bottomed in the subsurface of plaintiffs' land. That was the best kind of evidence which was available to plaintiffs. But it was not enough to take the crucial question of fact out of the field of inference or probabilities. There was one method—and only one—known to those engaged in the business by which it could be determined with certainty and sureness the exact loca-

tion of the underground terminus of the hole. That method was and is the making of a directional survey. The making of the survey and the use of the report thereof as evidence was not only a convenient means of proving or disproving the crucial fact essential to the right of plaintiffs to recover, it was the only way to prove or disprove such fact with sufficient certainty to remove it from the field of inference and probabilities. This was not an instance in which plaintiffs by means of other evidence could have established with the required measure of certainty the fact that the well was bottomed underneath their land. Neither was it an instance of the desired survey being cumulative of other available procedure to establish such fact. Without the making of such a survey, plaintiffs can never secure an adjudication of the critical issue in the case, based upon a foundation which is certain and sure. When the evidence is viewed in its entirety, we think that good cause for the making of the survey was shown and that an order should have been entered for its making, upon reasonable terms and conditions prescribed by the court.

The judgment is reversed and the cause remanded with directions to enter an order for the making of the deviational and directional survey, and for further proceedings thereafter.

PHILLIPS, Chief Judge (dissenting).

Rule 34 of the Federal Rules of Civil Procedure imposes as a condition to the granting of relief thereunder that good cause be shown therefor. The plaintiffs below, other than Paul S. Williams, are the owners of the SW¼ of the SE¼ of S. 25, T. 8 N., R. 6 E. The Continental Oil Company is the owner of Munnah Cosar Well No. 1. The surface point of the well is located 330 feet north of the section line between Sections 25 and 36, and 333 feet west of the boundary line between the SE¼ of the SW¼ and the SW¼ of the SE¼ of Section 25. The well has produced

in excess of 700,000 barrels of oil and it is estimated that it will produce an additional 100,000 barrels of oil. The plaintiffs below sought an order for a directional survey of the well for the purpose of determining whether it is bottomed in the SW¼ of the SE¼ of Section 25. After a very full hearing, the trial court concluded that the plaintiffs below had failed to show good cause for such survey.

It is my opinion that in determining whether good cause has been shown, the district court is necessarily vested with a wide discretion, and that its determination of such question should not be disturbed in the absence of a showing of a clear abuse of discretion.

Here, the trial court concluded, and, I think, correctly, that the geological facts disclosed by the drilling of other oil and gas wells in the area, including a non-commercial producer drilled in the SW¼ of the SE¼ of Section 25, and other indisputable physical facts established by the evidence showed that the presence of oil bearing strata in the SW¼ of the SE¼ of Section 25 was, at most, a very remote possibility. Since Munnah Cosar Well No. 1 had been and still is a very large producer of oil, it followed that the possibility that such well was bottomed in the SW¼ of the SE¼ of Section 25 was likewise a very remote possibility.

At most, plaintiff's efforts were in the category of what is commonly characterized as a "fishing expedition," which should not be countenanced.

Moreover, the evidence established that the making of such directional survey might result in damage to the well and could cause the loss of the well and the bond which the plaintiffs offered to furnish was so conditioned that it would not have afforded full protection to Continental Oil Company.

For the reasons indicated, I would affirm the judgment below.

Opinion of the District Court (14 F.R.D. 58)

WILLIAMS ET AL. v. CONTINENTAL OIL CO.

Civil No. 5149

W. D. Oklahoma,

Feb. 16, 1953.

The plaintiffs bring this action to recover for oil allegedly taken in the past and still being taken from the plaintiffs' land by a well of defendant's surfaced adjacent to plaintiffs' land but allegedly off-vertical to the extent that it is bottomed on the plaintiffs' property.

The well is the Continental Oil Company's Munnah Cosar Well No. 1; it is located on the surface at a point approximately 333 feet west and 330 feet north of the southwest corner of plaintiffs' 40 acres.

The plaintiffs filed a motion under Rule 34 of the Federal Rules of Civil Procedure[1] and in it requested this

[1] Fed. Rules Civ. Proc. rule 34, 28 U.S.C.A. provides:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of rule 30(b) [which provides certain safeguards against annoyance, embarrassment, or oppression] the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) [which defines the scope of inquiry to include immaterial testimony which appears reasonably calculated to lead to the discovery of admissible evidence] and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The Order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. * * *"

court to order a subsurface directional survey of this well in order to establish whether or not there has been a subsurface trespass.

A hearing of some four days was conducted in regard to this motion.

Apparently, this is the first time a request of this kind has been made under Rule 34. However, there seems little question but what the court has the power to compel such a survey where the facts so warrant.[2]

Rule 34, as distinguished from some of the other discovery rules, requires that the moving party affirmatively show "good cause."[3] Doubtless, the general standard for "good cause" as applied to documentary discovery has been fully met here. Such a survey would furnish competent, relevant and material evidence to be used when this case is tried on its merits; it is undisputed that such a survey would greatly aid the plaintiffs in the preparation of their case; and, further, this survey is the only means by which the desired data can be obtained.[4] However, implicit

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[2] See *Humble Oil & Refining Co.* v. *Sun Oil Co.*, 175 F.2d 670, regarding a surface survey under this rule. Also, see 1 Summers Oil & Gas § 26.

[3] In *Martin* v. *Capital Transit Co.*, 170 F.2d 811, 812, the Court said: "Rule 34 authorizes the District Court to order production of documents, papers, *etc.*, upon motion of a party 'showing good cause,' not upon a mere allegation or recitation that good cause exists. The rule contemplates an exercise of judgment by the court, not a mere automatic granting of a motion. The court's judgment is to be moved by a demonstration by the moving party of its need, for the purposes of the trial, of the document or paper sought. This view is confirmed by the Supreme Court in *Hickman* v. *Taylor*, 1947, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451." See also *Safeway Stores* v. *Reynolds* (U.S. App. D.C.), 176 F.2d 476; *Alltmont* v. *United States* (C.A. 3rd), 177 F.2d 971; *Reynolds* v. *United States* (C.A. 3rd), 192 F.2d 987.

[4] See 4 Moore's Federal Practice (2nd Ed.), Sec. 34.08, regarding what constitutes "good cause."

in this showing of "good cause" is the basic standard which requires the court to exercise this discretionary power in a reasonable manner. Certainly for a court to indiscriminately or promiscuously grant directional surveys without any showing of probability of trespass would be unreasonable and not within the purview of Rule 34.

A close reading of the cases where state courts have ordered directional surveys, either under express statutory authority or under the inherent powers of equity, reveals facts which unmistakably reflect that a mere possibility of trespass is not sufficient,—there must be some probability of trespass. Although these cases are not binding upon this court in its application of Rule 34, the principles they enunciate are highly persuasive in judging just what constitutes a reasonable exercise of this discretionary power.

In the leading case of *Texas Co.* v. *Hollingsworth*,[5] the plaintiff held leases on a substantial amount of land; between these holdings of the plaintiff the defendants leased a small strip of land which was one-half mile long, thirty-three feet wide, at one end, and just six feet wide, at the other end. On this strip, which averaged some nineteen feet in width, the defendants caused nine wells to be drilled. The complaint alleged that these wells of the defendants were not bottomed directly beneath their strip of land, but were in fact bottomed on the plaintiff's land; the complaint further alleged that inasmuch as these wells were drilled by rotary drills, it was not possible that the bore holes proceeded exactly straight down to the producing horizons. Along with the complaint the plaintiff filed its petition requesting that a subsurface directional survey be made of the nine wells. Attached to the complaint

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[5] 304 Ill. App. 607, 27 N.E.2d 67 (1940). Reversed 31 N.E.2d 944 on other grounds.

were affidavits of qualified drillers corroborating the verity of the plaintiff's allegations.

The Illinois Supreme Court reversed the decree of the circuit court and held that the lower court had the power to order a survey. The importance which the Court attached to the showing of probability of trespass was vividly emphasized by the statement.[6]

> "It is shown to the court intelligently, and supported by the best evidence which can be obtained on the question, that the matters and things alleged in the complaint are true; that there is only one way of finding out the truth of whether a trespass is being committed, whether wrong is being done, and that is by means of the directional subsurface survey prayed for. In addition to this evidence the court was surrounded by the very strong circumstance that in all human probability the matters complained of are true. Here is a strip of land that is six feet wide at one end. Is it possible to drill oil wells on this strip of land to the depths that they must necessarily go and to which the wells in question have gone, and have them bottom on the same six foot strip? A deviation of only three feet would put the bottom of the hole over on the plaintiff's land. * * *"

In *Gliptis* v. *Fifteen Oil Company*[7] the Supreme Court of Louisiana ruled that a court of equity had the inherent power to order a directional survey and required the trial court to so do. The facts in this case accent once again the roll played by probability of trespass. The defendant's well was drilled some 33 feet from the property line of the plaintiff, and some 333 feet from the surface location of a well of plaintiff's. When the defendant's well was opened

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[6] At 27 N.E.2d 67, 72.

[7] 204 La. 896, 16 So.2d 471.

and gas in large quantities was permitted to escape, the gas pressure in the plaintiff's well immediately dropped and shortly thereafter the plaintiff's well "went dead." The Louisiana Court cited the *Texas Company* case as being on all fours.

The Supreme Court of Texas in *Hastings Oil Co.* v. *Texas Co.*[8] held that the trial court had the authority to order a directional survey "in accordance with the usages of courts of equity" where the trial court, after hearing testimony had found:

> "(1) that 'there is probable cause to believe' that the bore hole of petitioners' well has so deviated from the vertical that, at the points where it encountered the Marginulina sand at 5716 feet and the Frio sand at 6750 feet, the hole is within the subsurface of the Phillips tract; (2) that 'there is probable cause to believe' that petitioners by permitting the bore hole of their well so to enter the subsurface of the Phillips tract have committed a trespass, and are committing a continuing trespass, upon the Phillips tract * * *."

Although the California "slant-hole" cases are a little different in character from the case at bar, inasmuch as the problem there involved was one of controlled directional drilling coupled with a specific intent to reach known oil deposits underlying the land of others, the court has carefully analyzed each of the reported cases in an effort to draw some parallel with the fact situation in the case under consideration.[9] It is noteworthy that in each of these

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[8] 149 Tex. 416, 234 S.W.2d 389 (1950).

[9] Although the question of intent is immaterial if in fact a trespass has resulted in conversion, the background and history of the California "whipstocking" cases doubtless was considered by the trial judges, along with other facts, when they determined that trespass was probable and thus ordered directional surveys. In the September, 1939, issue of the John Marshall Law Quarterly an article, written

cases where directional surveys were ordered, trespass was probable.

In *Union Oil* v. *Reconstruction Oil Co.*[10] the defendants drilled the well some 60 feet west from the southwest corner of plaintiff's lease. The original driller, defendant Marine Drilling Corporation, made an application to the commissioner of corporations for a permit to issue certificates of stock. The commissioner advised the defendant Marine Corporation that before such a permit could be

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[9] (Cont'd)
by Mortimer Kline, a California attorney, deals with the California problem of "crooked hole" drilling. This article reads in part:

> "Operators possessing barren properties realized the huge dividends which could be reaped by so drilling their wells as to bottom within and produce from the rich deposits of their neighbors. Suddenly and without warning, an epidemic of 'crooked' hole drilling occurred simultaneously throughout California. The most intensive drilling campaign was commenced in what had been considered theretofore a non-productive area of the Signal Hill oil field.
>
> "Briefly we will focus upon that situation.
>
> "Words are inadequate to depict the 'boom' which engulfed the locality. A forest of derricks was created with foundations almost in contact with one another. Oil well supply houses were deluged with orders for equipment. The field was a veritable beehive of activity, with crews feverishly working twenty-four hours a day. The office of the Corporation Commissioner of California was swamped with numerous applications for issuance of securities to be utilized for the purpose of raising funds to finance these projects. The gullible public, always willing to buy, 'invested millions of dollars in the purchase of royalty interest from individuals and royalty concerns scattered throughout the country. This sudden activity was viewed with alarm by the oil companies owning valuable producing leases in the vicinity of these wells. Their engineers had advised that wells, if drilled vertically upon such adjacent lands, would produce large quantities of salt water. The area soon became known as the 'hot spot' or 'asbestos flat.'

[10] 20 Cal. App.2d 170, 66 P.2d 1215 (1937). Also, see 51 P.2d 81.

issued the defendant Marine Corporation would have to file an affidavit to the effect that, "it was not the intention of the Marine Corporation to trespass upon or under neighboring premises." This affidavit was never filed and consequently the application was dropped. The drilling then

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[9] (Cont'd)

"Warning notices were sent notifying the operators of suspected 'crooked holes' that they should not permit their wells during the drilling thereof, to trespass upon or penetrate the leases of their neighbors and should employ all reasonable means to prevent such trespass. This gesture must have been regarded with amusement by these operators who at the moment were burrowing into the fertile sands of those sending the notices. The drilling continued unabated, and within a period of a few months many wells were completed which produced oil at a rate consonant with wells located 'up-structure' and wholly inconsistent with their true position on the oil structure.

"Companies owning the 'up-structure' leases, such as the Shell Oil Company, Union Oil Company of California, The Texas Company, and a number of other companies, joined in a secret investigation. Special engineers were employed, and a special engineering office was established in the field. The area was under constant surveillance of field scouts. In a few weeks time a mass of information was collected. In some instances operators were found to be locking tubing and rods in wells for the purpose of preventing surveys. Such operations invariably took place in the early morning hours when we were supposedly asleep. • • •

"Suddenly and without warning, forty law suits were filed, each encompassing a single well. The initial effect of the filing of the legal actions was dramatic. A number of wells were abandoned, being plugged without the removal of tubing or pumping rods. Operators of more belligerent type, employed some method of locking of tubing or rods, or both, so as to prevent the making of subsurface surveys of their wells. • • •

"Operators of suspected wells furnished erroneous logs and reports to the California Mining Bureau and others falsified their drilling records, concealed use of deviational tools and otherwise made the task of discovery an arduous one. • • •

"It is difficult to estimate the amount of oil stolen by these crooked wells. It probably approximated a million dollars. It has been estimated that between four and five million dollars in money and property was lost as a result of these drilling operations."

proceeded under the supervision of a directional drilling expert; directional or deviational tools consisting of whipstocks, Lucey spud bits, and knuckle joints were employed for the purpose of changing the direction which the well was taking in the course of the drilling. Some 20 or 30 "single shot" surveys were made which showed that the well was off the vertical. There was even evidence that one of the drillers admitted that the defendants were under plaintiff's property, but that they wanted to get off and were trying so to do.

In *Alphonzo E. Bell Corp.* v. *Bell View Oil Syndicate*[11] the well was drilled on a tract of land 60 feet by 240 feet. In addition to other persuasive evidence, the plaintiffs produced testimony that a directional survey had previously been made of this very hole and that such survey disclosed that there had been a trespass upon the plaintiff's land.

In *Union Oil Co. of California et al.* v. *Mutual Oil Co. et al.*[12] the exact facts upon which the court relied in ordering a directional survey are not set out and consequently this case gives us little aid, other than to demonstrate the power of the court to order such a survey under appropriate circumstances. However, the trial court found that Mutual Oil Co. and certain other defendants were guilty of the allegation, "that the drilling of said well by said defendants was deliberately and intentionally controlled and managed as to course and direction thereof so that said well crossed within the boundary" of the plaintiffs' premises. Although intention to trespass is immaterial, if in fact a trespass has occurred, the proved intent to trespass implies that the court had facts before it which indicated a trespass was probable at the time the survey was ordered.[13]

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[11] 24 Cal. App.2d 587, 76 P.2d 167 (1938).

[12] 19 Cal. App.2d 409, 65 P.2d 896, 898 (1937).

[13] See footnote 9, *supra*.

Parenthetically, it may be mentioned that in the case at bar the defendant raises the point that inasmuch as the well in question was drilled in good faith in accordance with the best known practices, accepted and approved by the oil and gas industry generally at that time, that the granting of the requested order would lay down a dangerous precedent. The defendant emphasizes the fact that there are any number of "crooked holes" in and about the area here involved and that issuing of this order would encourage "prospectors" to contract with landowners adjacent to all known "crooked holes," thereafter bring lawsuits, immediately demanding a directional survey, just on a mere chance that the off-vertical well be bottomed on the contracting landowner's property. Although such a practice may not be within the spirit of the rules of discovery, this court cannot concern itself with the possible far-reaching effect of a precedent which may be set regarding holes which are in fact bottomed on the land of another. If a trespass has been committed the legal rights of those against whom the trespass has taken place must be enforced. It is elementary that if conversion has occurred that the good or bad faith of the trespassing one is immaterial;[14] thus if

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[14] In the *Union Oil Co. of California* case, cited in fn. 12, *supra*, at p. 898 the Court said: "• • • The question of whether the well was intentionally or unintentionally drilled so as to slant into plaintiffs premises, is immaterial here. In either case a trespass was committed in the drilling of the well and the trial court further found 'that the maintenance of said Carpenter No. 1 Well and the production of petroleum therefrom constituted a continuing trespass' upon plaintiffs' premises. • • • Thus the appealing defendants were chargeable with trespass as well as conversion by reason of the acts of their agent, Mutual Oil Company, for 'neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action.' [citing cases.]"

In the *Alphonzo E. Bell Corp.* case, cited in fn. 11, *supra*, at p. 173, the Court said: "Again, the contention that it does not appear from the pleadings whether the wells were drilled in accordance with the generally accepted and prevailing art and drilling practice at the time the wells were drilled presents no logical basis upon which to found

the adjoining landowner can show that there is a probability that his land has been invaded, intentionally or otherwise, under Rule 34 he is entitled to a survey to aid him in establishing that fact.

If there be merit to the contention that the companies, who in good faith drilled with reasonable care in conformity with the accepted standards of the time, are entitled to some special dispensation apart from the general law dealing with conversion and its Statute of Limitations, such consideration must come from the legislature, and not through the court by means of a twisting and distorting of well entrenched procedural and substantive principles of law.[15]

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[14] (Cont'd)
an argument that the complaint or pleadings filed by the interveners is defective. The mere fact that the drillers of other wells and the owners of adjoining properties may have so drilled their wells as to bottom the same where they had no right to lay the bottom of their wells, and extract oil that belongs to others, is no excuse whatever for the alleged actions of the defendants, if it be assumed that they drilled their wells and bottomed the same for the purpose of capturing oil, gas, and other hydrocarbons wherever the same could be obtained irrespective of the rights of adjoining owners. * * *" Accord, *Gliptis* v. *Fifteen Oil Co.*, fn. 7, *supra.*

[15] The California Legislature in 1935 enacted Sec. 349 3/4 of Cal. Code of Civ. Proc. which provides:

> "Within one hundred eighty days: * * * (a) An action to enjoin, abate, or for damages on account of, an underground trespass, use or occupancy, by means of a well drilled for oil or gas or both from a surface location on land other than real property in which the aggrieved party has some right, title or interest or in respect to which the aggrieved party has some right, title or interest. (b) An action for conversion or for the taking or removing of oil, gas or other liquid, or fluids by means of any such well.
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> "When Cause of Action Accrues. When any of said acts is by means of a new well the actual drilling of which is commenced after this section becomes effective, and such act was knowingly committed with actual intent to commit such act, the cause of action in such case shall not be deemed to have accrued until the discovery, by the aggrieved party, of the act

As illustrated in the previously cited cases, when once the probability of trespass is shown, then the court is not only justified in ordering a temporary invasion of the property of a defendant, but it has the duty to so do. As aptly phrased by the United States Supreme Court in *Montana Company* v. *St. Louis Mining & Milling Company*:[16]

> "* * * To 'establish justice' is one of the objects of all social organizations, as well as one of the declared purposes of the Federal Constitution; and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of temporary invasion of one's possession should yield to the higher good of establishing justice; * * *."

As to the likelihood of trespass it goes without saying that the court should not require that measure of proof which would be needed to establish the fact of trespass at a trial on the merits, since if such proof could be made there would be no need for the sought after evidence; however, there must be a showing of probability as distinguished from a far removed possibility.

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[15] (Cont'd)

> or acts complained of; but in all other cases, and as to wells heretofore or hereafter drilled, the cause of action shall be deemed to have accrued ten days after the time when the well which is the subject of the cause of action was first placed on production.
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> "Only One Cause of Action. Notwithstanding the continuing character of any such act, there shall be but one cause of action for any such act, and the cause of action shall accrue as aforesaid."

The constitutionality of the retroactive element of this statute was expressly upheld in *Standard Oil Co. of Calif.* v. *United States*, 107 F.2d 402, *cert. denied* 309 U.S. 654, 697, 673.

[16] 162 U.S. 160, 14 Sup. Ct. 506 (1892).

[APPENDIX]

We now turn to the case at bar. From the hearing the court finds the following facts:

(1) The well involved here, the Continental Oil Company's Munah Cosar No. 1, is located in the center of the SE/4 of SE/4 of SW/4 of Section 25, Township 8 North, Range 6 East, Seminole County, Oklahoma. This well is located at a point on the surface approximately 333 feet west and 330 feet north of the southwest corner of Plaintiffs' 40 acres.

(2) The Munah Cosar well is located on a lease which since prior to 1928 has been owned by the defendant Continental Oil Company and the Fisher Oil Company.

(3) The Munah Cosar was drilled, completed and placed upon production in 1928. It has produced something over 700,000 barrels of oil and may reasonably be expected to produce an additional 100,000 barrels.

(4) The Little River field, in Seminole County, Oklahoma, in which the producing oil formation is the Wilcox sand, was drilled and developed over twenty years ago. Many of its wells are still producing substantial quantities of oil. Interspersed throughout this field are dry holes, producing wells, and wells which originally produced but have since been abandoned because of declining production.

(5) The Munah Cosar well is producing from the producing structure known as the Little River field, although it is located upon the extreme northeastern flank, with the main body of the Little River field lying south and southwest of the Munah Cosar.

(6) Although the Munah Cosar was drilled in accordance with the accepted and approved practices of the oil industry, at the time, the bore hole is off-vertical. The hole has a measured depth of something over 150 feet more

than the vertical depth of the producing formation beneath its surface location.

(7) If the Munah Cosar's vertical deviation were all in one direction, the horizontal displacement between the surface location and the bottom of the hole would be approximately 1000 feet. However, there is only a remote possibility that the vertical deviation was all in one direction. The hole probably pursued an irregularly wandering course or took a gently spiralling course, and is bottomed at some point with a horizontal deflection from surface location of 500 feet or less.

(8) At the time the Munah Cosar was drilled the Twin-States Oil Company drilled a well on plaintiffs' land in the center of the 10-acre tract lying immediately east of the 10-acre tract upon which the Munah Cosar is located. The Twin-States well produced about 60,000 barrels of oil during a three year period and was thereafter abandoned due to declining oil production and because of salt water encroachment. At the time it was abandoned it was producing about 10 barrels of oil daily.

(9) The plaintiffs herein, except Paul Williams, are the owners of the 40-acre tract immediately east of the Munah Cosar and upon which the Twin States well was located, being the SW/4 of SE/4 of Section 25. Plaintiff, Paul S. Williams, has a contract with the owners of this 40 acres in which he has agreed to prosecute this action, paying all of the costs and expenses thereof, in consideration of ⅞ of any recovery obtained.

(10) Gulf Oil Corporation drilled a well, at approximately the same time the Munah Cosar and the Twin-States wells were drilled, on the 10-acre tract directly south from the Twin-States well. This Gulf well (the Wicey Cosar) has produced many thousands of barrels of oil and is still producing oil in substantial quantities along with comparatively little salt water.

(11) In a straight line extending due south of this Gulf well, and at regular 660-ft. intervals there are a number of wells which have produced substantial quantities of oil from the Wilcox sand. Some of these are still producing. This line of wells, which ends on the north at the abandoned Twin-States well, constitutes the eastern boundary of the Little River field.

(12) Within the past three years two dry holes have been drilled in the N/2 of the SE/4 of Section 25. These lie immediately north and east of the plaintiffs' 40 acres. The Wilson & Williams well was located in the SE/4 of NW/4 of SE/4 on the 40 acres directly to the north of plaintiffs' 40 acres; the Rycade & Williams well was located in the SE/4 of NE/4 of SE/4 on the 40 acres directly northeast from plaintiffs' 40 acres. Both of these wells were drilled to the Wilcox sand but neither produced oil in commercial quantities.

(13) There have been other dry holes drilled to the Wilcox sand at various times in the past to the north, to the northeast, to the east, and to the southeast, of plaintiffs' land.

(14) There is no convincing evidence, either on the surface of the ground, or based upon subsurface geological information or well performance, that there is an oil producing structure beneath the plaintiffs' land, or that such land is now, or ever has been, underlaid by recoverable oil in commercial quantities.

(15) The casing in the Munah Cosar is over twenty-four years old. The salt water production, which has a corrosive effect upon casing, tubing and rods, has gradually increased during the last twenty years; at this time the well is producing a substantial amount of salt water.

(16) To survey this well, the pump at the bottom of the hole must be unseated, the tubing and rods must be

pulled out of the hole, a string of pipe (or tubing) with the surveying instrument attached must be run. To again place the well on production the tubing and rods must be re-run into the hole and the pump must be re-seated.

The theory behind the plaintiffs' claim is that the Munah Cosar well lies directly over a fault, and that the Munah Cosar is producing from a reservoir completely separate and apart from the Little River field; they contend that the well is producing from a structural high located some 1000 feet to the northeast of the surface location of the Munah Cosar, and that the center of the high is directly beneath the plaintiffs' 40 acres; the plaintiffs' contend further that the 40-acre tract just north from plaintiffs' land and the 40-acre tract to the northeast from plaintiffs' land are surfaced over this same reservoir of oil. This alleged reservoir, according to the testimony of Mr. Williams, expert witness, and one of the plaintiffs, originally contained some 4,800,000 barrels of recoverable oil.

The geology, seismography and engineering testimony submitted at the hearing is in decided conflict. There exists a wide divergence of opinion between the expert witnesses of the plaintiffs' and the defendant's. However without analyzing the testimony with particularity, certain uncontradicted facts appear to this court to be controlling.

The only well drilled on plaintiffs' 40 acres, the Twin-States well (see finding No. 9) which was located directly over the alleged highly productive reservoir produced only some 60,000 barrels of oil before being plugged; two other wells, one to the north, the other to the northeast of plaintiffs' land, which were also drilled directly over the alleged reservoir, utterly failed to produce oil in commercial quantities. In view of this the court is satisfied that no independent reservoir exists to the east and northeast of the Munah Cosar; and, it seems inconceivable to this court that the bore hole of Munah Cosar wandered either to the east

or northeast and converted some 700,000 barrels of oil from the very land where three other wells obtained a combined production of only something over 60,000 barrels.

The theory of the plaintiffs' is purely conjectural and speculative to the highest degree.

It must not be overlooked that in all cases, without exception, where courts in the past have ordered directional surveys, the plaintiffs were the owners of productive lands with known oil deposits. Thus the courts had before them various facts demonstrating probability of trespass, coupled with the unqualified fact that the plaintiffs had oil which could be the object of conversion.

Although not controlling, there is one other element which this court could not completely ignore in its rationale.

The cases uniformly agree that where a survey is ordered the complete risk and hazard, if any, must be borne by the plaintiff; the defendant cannot be submitted to possible loss. Without exception the plaintiff must post a bond sufficient to hold the defendant harmless.[17] In these other cases the bond was comparatively small inasmuch for all practical purposes there was involved no risk to the well. The surveys were made on new wells; the age of

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[17] In the *Gliptis* case, fn. 7, *supra,* at page 481, the Court said: "* * * Of course, a defendant who is required to surrender his well for the purpose of having it surveyed by experts appointed by the court is entitled to protection against such loss and damage as may reasonably be expected to result from such survey. * * * If the survey is made, it will be made not at the risk of the defendant, but at the risk of plaintiff who must pay all costs thereof and provide ample safeguard to protect defendant's rights."

In the *Texas Co.* case, fn. 5, *supra,* at page 74, the Court said: "* * * Should defendants fail or refuse to answer said petition, then the court shall allow said petition and order a directional subsurface survey under the direction of the court after exacting from petitioner ample safeguards for the protection of the defendants' rights and their security * * *."

these wells varied from a few months, wells not yet completed, to wells about three years old.

As pointed out (see finding No. 16) the casing in the Munah Cosar is over twenty-four years old. Although it is unlikely that any injury would result from the proposed survey, there is some hazard and risk. If the casing should break or collapse, or if equipment should be lost in the hole, it is probable that the Munah Cosar could not again be placed upon production. Should this happen, in addition to the cost of drilling, completing and equipping a new well, the recoveries of oil from such new well would be substantially less than the anticipated production of the Munah Cosar of 100,000 barrels (see finding No. 3).

Naturally, as it becomes more improbable that a defendant has been guilty of a trespass, the court should be more sensitive to the possible hardship and risk to which the defendant is to be submitted.

For the court to be justified in ordering a directional survey under the facts in this case, Rule 34 must unqualifiedly stand for the legal proposition that, "all landowners in the general vicinity of a well known to be off-vertical can as a matter of right, without further proof, demand a survey, regardless how improbable it be that a subsurface trespass has ensued." The court is cognizant of and in complete harmony with the liberal spirit imbued in the Federal Rules of Civil Procedure;[18] however, discovery does not go this far.

Motion for directional survey denied.

Dated this 16th day of February, 1953.

W. R. WALLACE,
United States District Judge.

Filed February 16, 1953.

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[18] "Rule 34 is to be liberally, rather than narrowly construed and its provisions have the force and effect of a statute." 2 Barron & Holtzoff, Fed. Prac. and Proc., 485 Sec. 792.

JUDGMENT OF THE COURT OF APPEALS

Forty-Eighth Day, May Term, Thursday, August 19th, 1954. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to enter an order for the making of the deviational and directional survey, and for further proceedings thereafter; and that Cordelia Pearl Williams, successor in interest to Paul S. Williams, Mary Lowe Johnson, Bennie Johnson, Nora Johnson Lowe, John E. Lowe, Elizabeth Lowe and Mary Alice Lowe Frank, appellants, have and recover of and from Continental Oil Company, appellee, their costs herein and have execution therefor (R. 52).